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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PETER D. COBURN,
Petitioner,
v.
PAN AMERICAN WORLD AIRWAYS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. May a court, consistently with this Court's decision last Term in *United States Postal Service Bd. of Governors v. Aikens*, 103 S.Ct. 1478 (1983), set aside a jury's finding of age discrimination after the court has held that the plaintiff "clearly" introduced sufficient evidence to establish a prima facie case?

2. In an age discrimination case where the jury, as trier of fact, returns a verdict in favor of the plaintiff, and where the court holds that plaintiff presented sufficient evidence to establish a prima facie case of discrimination, may the court independently weigh the evidence and enter j.n.o.v. in favor of the defendant-employer on the ground that plaintiff failed to prove discriminatory motive by a preponderance of the evidence?

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OPINIONS BELOW

The opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit is reported as *Coburn v. Pan American World Airways*, 711 F.2d 339 (D.C. Cir. 1983), and appears in the Appendix ("App.") at 1. The opinion of the United States District Court for the District of Columbia granting judgment n.o.v. is not reported.

JURISDICTION OF THE COURT

The Court of Appeals issued its opinion and judgment in this case on June 28, 1983. App. at 1. On July 29, 1983, the court denied petitioner's timely Petition for Rehearing and Suggestion for Rehearing En Banc. App. at 11,12.

The jurisdiction of this Court is conferred by 28 U.S.C. §1254 (1).

STATUTORY PROVISIONS INVOLVED

29 U.S.C. §623 (a) provides in pertinent part:

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[.]

29 U.S.C. §631 (a) provides that

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

STATEMENT OF THE CASE

In August 1980, Petitioner Peter D. Coburn, a 43-year-old employee of respondent Pan American World Airways, was terminated through reduction in force. Petitioner filed a civil action alleging age discrimination. The jury returned a verdict in favor of petitioner; however, the trial judge granted respondent's motion for judgment *non obstante verdicto* on the ground that petitioner had failed to establish a prima facie case of age discrimination. The District of Columbia Circuit held, on the contrary, that petitioner had "clearly" introduced sufficient evidence to establish a prima facie case of discrimination. Nevertheless, the court affirmed the entry of j.n.o.v., finding that petitioner had failed to prove discriminatory motive by a preponderance of the evidence "and for a jury to find in his favor it would have to indulge in an impermissible speculation." App. at 10.

The Trial

Petitioner was employed by respondent for 17 years, most recently in a managerial position designated "Reservations Supervisor". In this position, petitioner was in charge of the system which ensured that telephone calls to respondent's Washington, DC offices were answered by an agent as quickly as possible.

On August 18, 1980, petitioner was notified by respondent that he was being released from his position as the result of a reduction in force. Petitioner was the only employee released from the Washington, DC office, and one of only two employees released in the Eastern Central Region of the United States. The other released employee was also over the age of 40.

The reduction in force resulting in petitioner's release was supposed to have been caused by financial reasons, and was

supposed to have been based upon relative performance (*i.e.*, the least capable performer was to be released). However, because respondent retained younger, less competent employees than petitioner, and because shortly after petitioner's release respondent promoted two younger employees to be Reservations Supervisors in the Washington, DC office,[1] petitioner filed a charge of age discrimination with the Equal Employment Opportunity Commission. 29 U.S.C. §626(d).

The administrative process did not afford petitioner any relief, and he timely filed this suit in United States District Court for the District of Columbia alleging violations of the Age Discrimination in Employment Act of 1975, 29 U.S.C. §621 *et seq.*[2] The court's jurisdiction was invoked pursuant to 29 U.S.C. §626 (c)(1). Petitioner timely demanded a jury, as permitted by *id.*, (c)(2).

The case was tried to the jury between March 16 and 19, 1982. The jury heard that petitioner was over the age of 40, and thus was a member of the class protected by the Act. The jury also heard that petitioner was a highly satisfactory employee. Petitioner was assigned the responsibility of managing respondent's telephone reservations system in its Washington, DC office. When he was given this assignment in April 1979, he was instructed to improve the office's Service Quality Level (SQL), which measures the percent of incoming telephone calls answered in 20 seconds. Shortly after petitioner assumed this task, the Washington, DC office ranked number one in SQL ratings of all of respondent's offices in the United States.

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[1]These younger employees were promoted in November 1980 and May 1981.

[2]Petitioner also filed claims of sex discrimination under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.* Those claims, which were tried to the court, were decided adversely to petitioner, but they are not an issue in this petition.

In addition, the jury heard that younger managers than petitioner were retained, and that less than three months after petitioner was released, respondent promoted a young woman to the position of Reservations Supervisor, which petitioner had just vacated. One of respondent's officials testified to the jury that after petitioner's termination, the SQL performance of the Washington, DC office was so "poor . . . [that] a *number of additional people were hired*" to make up the loss.[3]

Respondent argued that its internal procedures required it to terminate the least competent manager, whose identity was determined through the application of a comparative ranking system. According to respondent, although younger managers were retained, they were retained not because they were younger but because they were more competent than petitioner.

However, the jury heard two disinterested Pan Am employees testify that petitioner was far more competent than some of the younger supervisors who were retained, Transcript at 196-97, 229-30; that petitioner was replaced by a younger, less experienced employee barely two months after his release, Plaintiff's Exhibit 16; that the performance of petitioner's office dropped so markedly after his release that additional employees had to be hired, Transcript at 529; and that the average age of the managers in petitioner's office dropped 5 years in just 10 months: from 42.5 years at the time of his release in August 1980, to 38.6 on November 1, 1980, to 37.6 years in July 1981, Plaintiff's Exhibits 13, 16.[4]

The jury also heard Edward Cooper (under 40), the official who made the decision to terminate petitioner, testify about the manner in which he ranked his subordinates. According to

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[3]Testimony of Frederick Kells, Eastern Central Regional Managing Director, Transcript at 529.

[4]The relevant exhibits were in the form of charts displayed to the jury throughout the trial.

Mr. Cooper, he gave one of his younger subordinate managers extra credit during the ranking process for improving his attendance problems, but did not credit petitioner in this area because petitioner had no attendance problems. Transcript at 694-96.

The jury further heard Mr. Cooper testify that he downrated petitioner for not performing the full range of his duties. However, Mr. Cooper also testified that he would not permit petitioner to perform those duties because petitioner was needed to monitor the critical telephone system. Transcript at 680-83.

Petitioner also attempted to introduce direct evidence of discriminatory animus. During his case in chief, petitioner proffered the testimony of William Ferchak, of the International Brotherhood of Teamsters, Airlines Division. Transcript at 583-95. Counsel proffered that Mr. Ferchak would testify that a Mr. Slattery, an official of respondent's Eastern Central Region, where petitioner was employed, had exhibited a bias towards young women.[1] The court rejected the testimony on the ground that "Mr. Ferchak wouldn't dare to testify as has been represented..." Transcript at 595.

Respondent moved for a directed verdict at the close of petitioner's case, and again at the close of all the evidence. The court denied both motions.

The jury, having been instructed correctly that petitioner bore the burden of proving by a preponderance of the evidence that his age was a determining factor in his termination, returned a verdict in favor of petitioner. However, the trial court granted respondent's motion for judgment n.o.v. on the ground that petitioner had failed to establish a prima facie case of discrimination. *Coburn v. Pan American World Airways,*

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[1] "Mr. Ferchak would testify from his personal knowledge that Mr. Slattery had indicated to him that he...Mr. Slattery, preferred to hire young attractive women...because of his sexual interests...." Transcript at 595.

CA No. 81-1086 (D.D.C. May 7, 1982) (Mem. Op. granting j.n.o.v.).[4]

The Decision on Appeal

A Panel of the District of Columbia Circuit affirmed the result, but not the trial court's reasoning. *Coburn v. Pan American Airways*, 711 F.2d 339 (D.C. Cir. 1983) [hereinafter "*Coburn*"]. The Panel agreed that allegations of age discrimination should be analyzed using the standards governing allegations of race and sex discrimination arising under Title VII, and first articulated by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). The District of Columbia Circuit had recently applied the *McDonnell Douglas* paradigm to an allegation of age discrimination in *Cuddy v. Carmen*, 694 F.2d 853 (D.C. Cir. 1982), which was tried to the bench because the plaintiff was a federal employee. Adopting that analysis, the Panel stated that

> An inference of discrimination is created if the plaintiff shows that he (1) belongs to the statutorily protected age group (40-70), (2) was qualified for the position, (3) was terminated, and (4) was disadvantaged in favor of a younger person.

Coburn, App. at 5 (citation omitted).

Based on that analysis, the Panel held

> ...contrary to the district court, that Coburn created a reasonable inference of discrimination by making out a prima facie case under the ADEA. Coburn was (1) 43 years

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[4]At the same time, the trial court denied respondent's conditional motion for a new trial. However, subsequent to petitioner's appeal, the trial court stated in an indicative ruling that it would grant a new trial if presented with the opportunity. *Coburn v. Pan American World Airways*, CA No. 81-1086 (D.D.C. June 8, 1982) (indicative ruling).

old, (2) acknowledged by all to be qualified as a Reservations Supervisor, and (3) was fired while (4) younger persons were retained and others later promoted. The evidence produced at trial was clearly sufficient to support a jury finding of a prima facie case....

App. at 6 (citation omitted).

The Panel then held that respondent met its statutory burden of articulating a legitimate, non-discriminatory reason for releasing petitioner, *viz.*, "Coburn was terminated when he was evaluated the least productive." App. at 7.

Thus, according, to the Panel, the question was whether petitioner was able to show that respondent's asserted reason was pretextual. *Id.* The Panel held that petitioner failed to meet this burden. The fact that the only other manager released in the reduction was over the age of 40 was "pure coincidence". *Id.* While petitioner alleged that the subsequent promotion of younger women to his position was evidence of pretext, the Panel disagreed, finding that "these employees were only promoted after implementation of a merger between Pan Am and another airline". *Id.*

The Panel determined that respondent followed its procedures "to the letter", App. at 7, without stating the basis for that conclusion. However, the jury had heard that respondent failed to include in the reduction employees from National Airlines (with whom respondent had recently merged), although required by the procedures; and that petitioner's position was sufficiently different from the other managers that he should not have been compared with them. The Panel did not discuss this evidence.

Finally, the Panel rejected petitioner's basic claim that his age was a determining factor in his release as evidenced by the retention of a younger employee less competent than he.

> The reduction in force criteria were specifically designed to determine the "least productive" employee.... While

> Coburn disputed his rating in several regards, he produced no evidence that age was the reason he was rated low.

App. at 9.

Concluding, the Panel found that

> Coburn draws a compelling picture of a long-time loyal employee who may have been treated less than fairly. But the record is devoid of any evidence that age was a "determining factor" in Pan Am's decision to terminate him. Coburn failed to carry his burden of proving discriminatory motive by a preponderance of the evidence and for a jury to find in his favor it would have to indulge in impermissible speculation.

Id. (citation omitted).

Petitioner timely sought rehearing or rehearing en banc, arguing that the Panel's decision was in conflict with this Court's opinion last Term in *United States Postal Service Bd. of Governors v. Aikens*, 103 S.Ct. 1478 (1983), and that the decision misinterpreted both *Aikens* and *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248 (1981). However, on July 29, 1983, the court summarily affirmed the initial decision. App. at 11.

REASON FOR GRANTING THE WRIT

THE COURT OF APPEALS' DECISION IN THIS CASE DIRECTLY CONFLICTS WITH THIS COURT'S PRIOR DECISIONS GOVERNING THE BURDEN OF PERSUASION IN DISCRIMINATION CASES

Petitioner requests that the court's decision in this case be vacated and remanded for two fundamental reasons. First, the court's decision is in conflict with *United States Postal Service Bd. of Governors v. Aikens*, 103 S.Ct. 1478 (1983) [hereinafter "*Aikens*"], in which this Court held that where an employer has failed to persuade the trial court to dismiss the action for lack of a prima facie case, "*the fact finder* must then decide" the ultimate question of intentional discrimination. 103 S.Ct. at 1482 (emphasis added). Second, the decision is in direct conflict with this Court's decision in *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) [hereinafter "*Burdine*"], which carefully defined the legal effect of a prima facie case in a discrimination suit.

The introduction of rebuttal evidence does not nullify the power of the jury to infer the ultimate fact. Where a plaintiff "clearly" establishes a prima facie case of discrimination, and where the employer's evidence is aimed entirely at persuading the trier of fact of its proper motives, the jury must be permitted to disbelieve the employer and find discrimination.

A. Under *Aikens*, Where the Plaintiff has Established a Prima Facie Case of Discrimination, the Ultimate Question of Discrimination is for the Trier of Fact

To prevail in a case of discrimination, a plaintiff must first raise an inference of discrimination by establishing a prima facie case. While the elements of such a case will vary with the

facts, the purpose of placing this burden on the plaintiff is to eliminate the most common non-discriminatory reasons for the action complained of. *See Burdine*, 450 U.S. at 254. In a case involving failure to hire or promote, the factors to be eliminated concern minimum qualifications and the absence of a vacancy. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). In this case, to establish a prima facie case of unlawful discharge during a reduction in force, petitioner was required to show that he was performing satisfactorily and that younger employees were retained. *See Douglas v. Anderson*, 656 F.2d 528, 531 (9th Cir. 1981). The Panel determined that petitioner's evidence "clearly" was sufficient to meet his prima facie burden. *Coburn*, App. at 6.[7]

Last Term, this Court again clarified the role of the *McDonnell Douglas* analysis in discrimination cases. The purpose of the analysis is to provide "a sensible orderly way to evaluate the evidence in light of common experience". *Aikens*, 103 S.Ct. at 1482, quoting *Furnco Construction Co. v. Waters*, 438 U.S. 567, 577 (1977). A plaintiff who establishes a prima facie case raises an inference of discrimination because the trier of fact may "presume these acts, if otherwise unexplained, are more likely than not based on consideration of impermissible factors." *Furnco*, 438 U.S. at 577.

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[7]Although petitioner's case raises claims of age discrimination, the court below applied the standards established by this Court in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), for cases arising under Title VII of the Civil Rights Act of 1964. Most Courts of Appeals have utilized the *McDonnell Douglas* analysis in cases of age discrimination. *See, e.g., Garner v. Boorstin*, 690 F.2d 1034, 1035 n.2 (D.C. Cir. 1982); *Loeb v. Textron*, 600 F.2d 1003, 1014-16 (1st Cir. 1979); *Smith v. University of North Carolina*, 632 F.2d 316, 332-33 (4th Cir. 1980); *Harpring v. Continental Can Co.*, 628 F.2d 406, 408-409 (5th Cir. 1980), *cert. denied*, 454 U.S. 819 (1981); *Cova v. Coca-Cola Bottling Co. of St. Louis*, 574 F.2d 958, 959-60 (8th Cir. 1978); *Sutton v. Atlantic Richfield Co.*, 646 F.2d 407, 411 (9th Cir. 1981); *Schwager v. Sun Oil Co. of Pennsylvania*, 591 F.2d 58, 60-61 (10th Cir. 1979). *See also Lorillard v. Pons*, 434 U.S. 575, 584 (1978) ("the prohibitions of the ADEA were derived *in haec verba* from Title VII").

The ultimate question in these cases, however, is not whether plaintiff has established a prima facie case, but whether he has been the victim of intentional discrimination. *Aikens*, 103 S.Ct. at 1482; *Burdine*, 450 U.S. at 255. Where a plaintiff survives a motion to dismiss, and the defendant "has done everything that would be required of him if the plaintiff had properly made out a prima facie case", the only question in the case is "whether the [action] was discriminatory within the meaning of" the statute. *Aikens*, 103 S.Ct. at 1482.

In a case in which the defendant has presented his evidence of his legitimate, non-discriminatory reasons, the issue of intentional discrimination must be decided by the fact finder. *Id.* The question is one of persuasion: does the trier of fact believe the employer's evidence, or is it persuaded that a discriminatory reason more likely than not motivated the employer. *Id.*, quoting *Burdine*, 450 U.S. at 256. "In short", as the Court explained in *Aikens*, the fact finder "must decide which party's explanation of the employer's motivation it believes." 103 S.Ct. at 1482.

The Court of Appeals' decision in this case usurped the fact finder's power to decide the ultimate factual issue of discrimination. That decision conflicts not only with *Aikens* but with decisions of other Courts of Appeals. *Spagnuolo v. Whirlpool Corp.*, 641 F.2d 1109, 1112 (4th Cir. 1981), is an age discrimination similar to the one at bar. In *Spagnuolo*, the employer had terminated the plaintiff during a reorganization. When the jury returned a verdict in favor of the plaintiff, the employer appealed, arguing that its evidence of a legitimate business reason for its actions required judgment in its favor. *Id.* at 1112-13.

The Fourth Circuit rejected that argument:

> ...the articulation of a legitimate non-discriminatory reason is sufficient to insulate an employer from a directed verdict against it, *i.e.*, it dispels the adverse inference from a plaintiff's prima facie case. [However, t]he jury in its

consideration of all of the evidence may still find that the wrong occurred in the manner established by the plaintiff.

Id.

In another age discrimination case, *Tribble v. Westinghouse Corp.*, 669 F.2d 1193, 1196 (8th Cir. 1982), the Eighth Circuit similarly held that an employer who rebutted a prima facie case was not entitled to have a verdict directed in its favor:

> We believe that the jury accepted plaintiff's version of the case and thus considered the reasons offered by Westinghouse for plaintiff's discharge to be merely pretextual.

Id. See also Hagelthorn v. Kennecott Corp., 710 F.2d 76, 83 (2d Cir. 1983):

> ...it is for the fact-finder to determine whether it has been established by a preponderance of the evidence that the plaintiff would not have been fired but for his age.

The circumstantial evidence of respondent's motive was in conflict. Respondent argued to the jury that petitioner was released from employment under a system that required termination of the "least productive employee". *See Coburn*, App. at 7. Petitioner introduced evidence that employees younger than he were less competent; that he was replaced by younger employees after his release; and that after he was replaced the performance of his office deteriorated markedly, necessitating the hiring of additional people.

It is a fundamental principle of our system that conflicts in evidence are resolved by the trier of fact. *See, e.g., Lavender v. Kurn*, 327 U.S. 645, 653 (1946). Where the jury is the trier of fact, it has the exclusive authority to reject entirely respondent's explanation and decide that petitioner was the victim of intentional age discrimination. *See Aikens*, 103 S.Ct. at 1482 & n.5. The jury in this case did exactly that, and the courts below erred by setting aside the verdict in petitioner's favor.

B. Under *Burdine*, the Trier of Fact is Permitted to Infer Discrimination from the Evidence Even in the Face of the Employer's Rebuttal

In *Burdine*, this Court carefully defined the legal effect of a prima facie case. The prima facie case raises a mandatory inference of discrimination and "creates a presumption that the employer unlawfully discriminated against the employee." 450 U.S. at 254. The presumption thus created is sufficiently strong that the employer's silence "must" result in judgment for the plaintiff. *Id.* In this case, therefore, a jury that heard petitioner's evidence properly could have returned a verdict in his favor if respondent had introduced no evidence in its case.

Respondent did introduce evidence of its nondiscriminatory reason. According to respondent, its internal procedures required it to terminate the least competent of its managers, and although younger managers were retained, they were retained not because they were younger but because they were more competent than petitioner. The Panel found, and it is not seriously disputed, that with this evidence respondent sufficiently met its burden of production to avoid a directed verdict against it.

However, the Court of Appeals additionally found respondent's testimonial evidence so persuasive that it held that no reasonable jury could have found discrimination in this case. *Coburn*, App. at 8. That decision may be justified only if the court can find respondent's testimony more credible than petitioner's evidence. However, the power to determine credibility rests exclusively in the hands of the jury, and cannot be usurped by the court. *See Brady v. Southern Ry. Co.*, 320 U.S. 476, 479-80 (1943).

The decision below also departs from established case law in its treatment of the inference of discrimination created by the prima facie case. As discussed above, the legal effect of a prima facie case is the creation of a mandatory inference of

discrimination. A satisfactory rebuttal destroys only the mandatory aspect of that inference. This Court has expressly held that a defendant's rebuttal of a prima facie case does not nullify the power of the trier of fact to infer discrimination from all of the evidence:

> A satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence. Nonetheless, *this evidence and inferences properly drawn therefrom may be considered by the trier of fact* on the issue of whether the defendant's explanation is pretextual.

Burdine, 450 U.S. at 255 n.10 (emphasis added).

The jury in this case was *required* to infer discrimination from the evidence before respondent presented its case; *a fortiori* it was *permitted* to infer discrimination from this same evidence at the close of the case. Under the Court of Appeals' decision, respondent's rebuttal not only destroyed the legally mandatory inference of discrimination created by the prima facie case, it effectively rendered *any* inference of discrimination impermissible. That holding clearly is in direct conflict with the plain language of *Burdine*.

While it is apparent that neither the Court of Appeals nor the trial court inferred discrimination from the evidence in this case, where the plaintiff has established a prima facie case the power to make such inferences rests solely with the jury.

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences.

Tennant v. Peoria & P.U. Ry. Co., 321 U.S. 29, 35 (1944).

The decision in this case violates well-established principles governing entry of judgment n.o.v. In deciding a motion for a directed verdict or for judgment n.o.v., the court is obligated

to view the evidence in the light most favorable to the non-moving party, giving that party the benefit of every favorable inference that can be reasonably derived from that evidence. *See, e.g., Flores v. Pierce,* 617 F.2d 1386, 1389 (9th Cir.), *cert. denied,* 449 U.S. 875 (1980); *Hanson v. Ford Motor Co.,* 278 F.2d 586, 596 (8th Cir. 1960) (Blackmun, C.J.); 9 **C. WRIGHT & A. MILLER,** Federal Practice and Procedure §2524 at 543-44 (1971 ed.).

Viewed in its most favorable light, petitioner's evidence permitted a reasonable jury to infer that he was released, and younger employees were retained, because of his age. However, time and again, the courts below rejected the inference of discrimination in favor of the alternative inference urged by respondent.[8]

The jury's verdict of intentional and willful discrimination was based upon all of the evidence, including the same evidence the court found was "clearly sufficient to support a jury finding of a prima facie case". *Coburn,* App. at 6. That evidence was legally sufficient to support a verdict in petitioner's favor. *Burdine,* 450 U.S. at 255-56. The Court of Appeals improperly set aside the jury verdict, finding that a verdict in petitioner's favor would have to be based upon "impermissible speculation", *Coburn,* App. at 10, for

> [i]t is no answer to say that the jury's verdict involved speculation and conjecture. Whenever facts are in dispute or

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[8] *See* App. at 8,9: Petitioner argued that respondent's attempt to induce early retirement on the part of its older managers was evidence of improper motive, but the court found the attempt "humane"; petitioner cited the promotion of two younger women to his position, but the court concluded that the promotions occurred as the result of the merger between Pan Am and National Airlines; petitioner cited the retention of a younger employee whom witnesses identified as less competent, but the court found no evidence the disparity was motivated by discrimination. In each instance, the court set aside the jury's implicit determination that respondent's reasons were mere pretexts for discrimination.

the evidence is such that fair minded men may draw different inferences, a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems *to them* to be the most reasonable inference.

Lavender v. Kurn, 327 U.S. 645, 653 (1946)(emphasis added).

C. Whether Petitioner Proved Discrimination by a Preponderance of the Evidence is not a Question for the Court, but for the Jury

The Panel ultimately held that petitioner could not prevail on his claim because he "failed to carry his burden of proving discrimination by a preponderance of the evidence...." *Coburn*, App. at 10. The Panel's holding must be reversed because only the jury has the power to weigh the evidence.

It is well-established that in deciding a motion for judgment n.o.v., a court (trial or appellate "may not...weigh the evidence". *See, e.g., Boutros v. Riggs National Bank, D.C.*, 655 F.2d 1257, 1258 (D.C.Cir. 1981). "It is not for the court to weigh the evidence on both sides of a contested issue. To do so is the function of the jury." *Baltimore & O.R.Co. v. Postom*, 177 F.2d 53, 55 (D.C.Cir. 1949). *See also* cases cited in 9 **C. WRIGHT & A. MILLER**, Federal Practice and Procedure §2524 at 543 n.33 (1971 ed.).

The principle is familiar. The trial judge instructed the jury in this case that petitioner would establish his case by a preponderance of the evidence if the "evidence favoring his side of the issue is more favorable *to you* and causes *you* to believe" him. Transcript at 786 (emphasis added). Similarly, the Panel correctly observed that the court is not to weigh the evidence. *Coburn*, App. at 4. Nevertheless, both courts violated these proscriptions and weighed the evidence themselves.

The Panel appears to have based its holding on *Cuddy v. Carmen*, 694 F.2d 853 (D.C.Cir. 1982), which held that an age discrimination plaintiff must persuade the trier of fact by a preponderance of the evidence that his age was a determining factor in the employment decision. *Id.* at 857. *See Coburn*, App. at 5. However, because *Cuddy* involved a suit filed against the federal government, it was tried to the court and not to a jury. *Cuddy's* description of the burden is precisely correct; however, in a case where the trier of fact is the jury, whether plaintiff met his burden is a question for the jury and not for the court.

CONCLUSION

The decision of the District of Columbia Circuit in this case conflicts with this Court's most recent decisions concerning the allocation and burdens of proof arising under the federal discrimination statutes. In addition, the decision conflicts with decisions of other Circuits clearly holding that a jury has the fundamental right to disbelieve the employer's rebuttal evidence and find discrimination when the elements of a prima facie case have been met. The Court of Appeals apparently did not rely on this Court's decision in *Aikens*, for it is nowhere cited in the decision.

For all the foregoing reasons, petitioner urges this Court to grant his petition for certiorari, vacate the decision of the Court of Appeals, and remand that decision for additional consideration in light of *United States Postal Service Bd. of Governors v. Aikens*, 103 S.Ct. 1478 (1983), and *Texas Dep't. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1543

PETER D. COBURN, APPELLANT

v.

PAN AMERICAN WORLD AIRWAYS, INC.

Appeal from the United States District Court
for the District of Columbia
(D.C. Civil Action No. 81-01086)

Argued April 29, 1983

Decided June 28, 1983

June D.W. Kalijarvi, with whom *George M. Chuzi* and *Pamela A. Shea* were on the brief, for appellant.

Jeffrey S. Berlin, with whom *Richard L. Cys* was on the brief, for appellee.

Before: TAMM and WILKEY, *Circuit Judges*, and MCNICHOLS,* *Senior District Judge*, United States District Court for the District of Idaho.

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* Sitting by designation pursuant to 28 U.S.C. § 294(d).

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Opinion for the court filed by *Senior District Judge* MCNICHOLS.

MCNICHOLS, *Senior District Judge*: Peter Coburn appeals the district court's entry of judgment *non obstante veredicto* (j.n.o.v.) in favor of his employer, Pan Am, in Coburn's action under the Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.* (the ADEA). Coburn contends the order is improper because he made out a prima facie case of age discrimination and the company's purported reason for firing him was a pretext for age discrimination. He protests that the trial court invaded the province of the jury by weighing the evidence and assessing the credibility of the witnesses in order to overturn the jury verdict in his favor. He also contests several evidentiary rulings and the court's verdict as the trier of fact in a companion Title VII sex discrimination case.

Coburn, who served 17 years as a Pan Am employee, was 43 at the time of his termination in August of 1980. He was a management employee classified as a Reservations Supervisor in Pan Am's Reservations and Ticket Office in Washington, D.C. He was one of four Reservations Supervisors, all of whom have the same general managerial responsibilities.

In the late summer of 1980 Pan Am's financial situation was precarious. Top management instituted numerous cost-cutting measures, including a reduction of the work-force. The reduction-in-force was implemented after a Management Retirement Incentive Program failed to produce adequate cost-savings. The reduction-in-force plan implemented by management called for the termination of two management employees in the Eastern Central Region, one from the Washington Reservations and Ticket Office.

Pan Am policy mandated termination of the least productive employee in a designated peer group (groups of

employees performing the same function). After designation of a peer group and its approval by Richard Carlson, Regional Managing Director, a peer group analysis was performed by Edward Cooper, manager of the Washington office. Coburn ranked lowest in his peer group and Cooper recommended his termination. Coburn was notified effective August 18, 1980.

On May 18, 1981 Coburn filed suit under the ADEA seeking both damages and equitable relief. He amended his complaint on July 2 to include a sex discrimination count under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* (1976) (Title VII). Before trial, Pan Am moved unsuccessfully for summary judgment. At trial, after plaintiff's presentation of the case-in-chief, the trial court denied Pan Am's motion for directed verdict. A like motion was denied before the case went to the jury. The jury returned a verdict including special interrogatories in favor of Coburn on the ADEA claim, finding Pan Am willfully terminated him because of his age. As the trier of fact, the trial court found for Pan Am on the Title VII claim. After entry of judgment of the ADEA claim, Pan Am moved for judgment n.o.v. The trial court eventually granted judgment n.o.v. and an alternative motion for new trial, ruling that no evidence supported the jury finding that Coburn was discriminated against because of his age. Coburn appeals the verdict on his Title VII claim, the judgment n.o.v. on his ADEA claim, and several other rulings of the trial court which, because of our disposition of the former issues, we do not discuss. We turn initially to the ADEA claim and the propriety of the trial court's grant of judgment n.o.v.

THE ADEA CLAIM

Standard of Review

The standard for awarding a judgment n.o.v. is the same as that applied when ruling on a motion for a directed verdict. *Vander Zee* v. *Karabatsos*, 589 F.2d 723

(D.C. Cir. 1978), *cert. denied*, 441 U.S. 962 (1979). As this court has stated, "the motion should not be granted unless the evidence, together with all the inferences that can reasonably be drawn therefrom is so one-sided that reasonable men could not disagree on the verdict." *Murphy* v. *United States*, 653 F.2d 637, 640 (D.C. Cir. 1981), quoting *Vander Zee*, *supra*, 589 F.2d at 726. Judgment n.o.v.

> is proper only if "there can be but one reasonable conclusion" drawn from the evidence viewed "in the light most favorable to the plaintiffs [in this case], giving them the advantage of every fair and reasonable inference that the evidence may justify", *Foster v. Maryland State Savings and Loan Association*, 191 U.S. App. D.C. 226, 228, 590 F.2d 928, 930 (1978), *cert. denied*, 439 U.S. 1071 (1979).

Metrocare v. *Washington Metro. Area Transit Auth.*, 679 F.2d 922, 924-25 (D.C. Cir. 1982). "The trial court may not assess the credibility of the witnesses or weigh the evidence", *id.* at 925, citing *Boutros* v. *Riggs National Bank, D.C.*, 655 F.2d 1257, 1258 (D.C. Cir. 1981) and if "fair minded people might differ as to the conclusion appropriate", *Murphy*, 653 F.2d at 640, the court must let the jury verdict stand.

The Merits

The evidentiary guidelines governing the proof in discrimination cases were first set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), a suit arising under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* The same analysis is generally applicable in ADEA cases. *Sutton* v. *Atlantic Richfield Co.*, 646 F.2d 407 (D.C. Cir. 1981). We thus face the question whether reasonable persons could have concluded on the basis of the evidence at trial that Pan Am discriminated against Coburn on the basis of his age.

In the recent case of *Cuddy* v. *Carmen*, 694 F.2d 853 (D.C. Cir. 1982), this court articulated the standard for

review of a plaintiff's age discrimination action. To make out a prima facie case "a plaintiff must demonstrate facts sufficient to create a reasonable inference that age discrimination was 'a determining factor' in the employment decision." *Id.* at 856-57. By adopting the language "a determining factor" this circuit joined several other circuits which now use that standard. *See id.* at 857, n.19. An inference of discrimination is created if the plaintiff shows that he (1) belongs to the statutorily protected age group (40-70), (2) was qualified for the position, (3) was terminated, and (4) was disadvantaged in favor of a younger person, *id.* at 857. The court went on to describe as follows:

> Once a prima facie case has been established, the employer has the burden of producing evidence tending to show that the applicant was denied employment for a legitimate, nondiscriminatory reason. If the employer does so, and if his evidence is credible, the plaintiff must show by a preponderance of the evidence that the employer's asserted legitimate reason is merely pretextual. (citations omitted). Once this stage is reached, the order and allocation of proof has served its purpose of bringing "the litigants and the court expeditiously to [the] ultimate question" of discrimination. *Burdine, supra*, 450 U.S. at 253, 101 S.Ct. at 1093. The plaintiff, who at all times retains the burden of persuasion, must then show by a preponderance of the evidence that age was "a determining factor" in the employer's decision.

Cuddy, 694 F.2d at 857.

This analysis is easily adaptable from a failure to hire situation to the context of this case, an allegedly discriminatory discharge. *Metrocare*, 679 F.2d at 922. The issue before us is whether reasonable jurors could have decided on the basis of the evidence at trial that Peter Coburn's age was a determining factor in Pan Am's decision to fire him.

The District Court granted judgment n.o.v. for two reasons. The court first ruled that Coburn failed to prove a prima facie case because none of the evidence at trial would support an inference of discrimination, and for a jury to so infer would be a result of "impermissible conjecture and surmise". *Mattivi* v. *South American Marine Corp., "Huguenot"*, 618 F.2d 163, 167-68 (2d Cir. 1980). The District Court further ruled that even assuming plaintiff proved a prima facie case, the evidence was insufficient to support a jury finding that defendant's reasons for terminating Coburn were a pretext for discrimination. According to the District Court, the record was devoid of any evidence that Coburn's age was a determining factor in Pan Am's decision to fire him. Because we believe Coburn failed to carry his burden of proving discriminatory motive, we affirm the trial court's judgment.

The District Court rendered its opinion on May 7, 1983. Subsequent to that time, this court decided the *Cuddy* case, in which we articulated the previously outlined framework for analyzing ADEA claims. Thus the trial court did not have the benefit of our reasoning in *Cuddy* for guidance. While the *Cuddy* decision has much bearing on this case, it does not compel us to reverse.

We rule initially, contra to the district court, that Coburn created a reasonable inference of discrimination by making out a prima facie case under the ADEA. Coburn was (1) 43 years old, (2) acknowledged by all to be qualified as a Reservations Supervisor, and (3) was fired while (4) younger persons were retained and others later promoted. The evidence produced at trial was clearly sufficient to support a jury finding of a prima facie case based on *Cuddy*.

Pan Am urges us to require an ADEA plaintiff to prove something extra to make out a prima facie case in a reduction-in-force situation. Pan Am's rationale is that with a reduction-in-force the discharged employee

will virtually always be qualified. Thus, anyone in the protected age group will presumptively have a cause of action under the ADEA. They therefore argue that direct evidence of discrimination should be required to make out a prima facie showing in a reduction-in-force case. *Cuddy* makes it clear that direct evidence of discrimination is not required to prove a prima facie case and create an inference of discrimination. *Id.* at 856-57. We believe the exigencies of a reduction-in-force can best be analyzed at the stage where the employer puts on evidence of a nondiscriminatory reason for the firing. In this manner the employee always retains the burden of proving discrimination while the employer's situation is analyzed on a case-by-case basis.

In the face of Coburn's prima facie showing we now turn to the question of Pan Am's articulated nondiscriminatory reason for firing Coburn. Pan Am's evidence demonstrated a company in serious financial straits seeking to cut costs in an attempt to survive. The reduction-in-force was instituted to reduce what Pan Am viewed as a surplus of management personnel. The guidelines called for termination of the "least productive" employee in a designated peer group. Pan Am, using a numerical ranking system, evaluated its Reservations Supervisors on the basis of qualifications, abilities, productivity, and length of service. Additional credit was given to employees over 40 years of age. Coburn was terminated when he was evaluated the least productive. We find that Pan Am carried its burden of proffering a legitimate, nondiscriminatory reason for terminating Coburn by instituting a written policy, following it to the letter, and making an employment decision based on its results. The procedure satisfied Pan Am's statutory burden.

As in *Cuddy*, 694 F.2d at 857, Coburn then was required to show by a preponderance of the evidence that Pan Am's asserted reason was pretextual. Coburn pointed to numerous alleged inconsistencies and offered the testi-

mony of several witnesses in attempting to show that Pan Am manipulated its peer group analysis in a manner calculated to conceal age discrimination. The jury was apparently convinced by this evidence. The trial court, though, disagreed, finding that no reasonable jury could have so ruled. We now focus on that stage of the litigation, because the shifting evidentiary burdens had served the purpose of bringing "the litigants and the court expeditiously and fairly to the ultimate question" of discrimination. *Texas Dept. of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981).

Coburn first notes that both employees terminated in the Eastern Central Region of Pan Am's organizational structure were over 40. This is pure coincidence. The oldest employee, age 51, in Coburn's Washington Reservations and Ticket Office was retained. The other two managers retained in Washington were close to Coburn in age, though slightly younger. No other evidence was offered to show that Pan Am terminated a disproportionate number of older employees. On this record no pattern of age discrimination could reasonably be inferred.

Coburn finds suspicious Pan Am's attempt to induce managers aged 55-65 to retire early. Early retirement is a common corporate practice utilized to prevent individual hardship. It is a humane practice well accepted by both employers and employees, and is purely voluntary. The evidence showed that Pan Am was justified in attempting to reduce its costs, and voluntary retirement was clearly a fair attempt to do so. It supports not a hint of age discrimination.

Coburn takes issue with the composition of his peer group. He complains because two younger women who were employed as Trainers were not included with his category of Reservations Supervisors. However, the evidence makes it clear the two positions were distinct and

not properly combinable under established Pan Am policies. Coburn also relies on the fact that these two female employees were later made Reservations Supervisors to show discrimination. However, these employees were only promoted after implementation of a merger between Pan Am and another airline. The merger resulted in less need for trainers and an increased volume of sales, an increase creating a new need for more Reservations Supervisors. That these trainers were promoted does not indicate an age discriminatory animus on Pan Am's part.

Coburn attempts to demonstrate inconsistencies between prior Pan Am evaluations and the reduction-in-force evaluation. He claims he was the highest rated supervisor in February 1980, yet rated lowest for purposes of the reduction-in-force in August, just six months later. The short answer to this contention is that it is not supported by the evidence. All four Reservations Supervisors were rated "good" in February and given substantially similar ratings on more specific categories. The reduction-in-force criteria were specifically designed to determine the "least productive" employee. Coburn was fired only after ranking lowest overall after being rated in four distinct aspects of his job, and after being given extra credit for being over 40 years old. While Coburn disputed his rating in several regards, he produced no evidence that age was the reason he was rated low. Therefore, evidence of Pan Am's motive in the peer group analysis is "one sided" against the jury's verdict. *Vander Zee* v. *Karabatsos*, 589 F.2d 723, 726 (1978). We must conclude that under any view of the case, the evidence concerning age discrimination and the reasonable inferences to be drawn therefrom simply do not support a finding that the peer group analysis was manipulated to Coburn's disadvantage because of his age.

Because none of Coburn's other contentions lend support to his claim, we do not discuss them in detail. We

only add that evidence of age discrimination cannot be gleaned from them.

The ADEA protects employees only against unlawful age discrimination. Coburn draws a compelling picture of a long-time loyal employee who may have been treated less than fairly. But the record is devoid of any evidence that age was a "determining factor" in Pan Am's decision to terminate him. *Cuddy*, 694 F.2d at 857. Coburn failed to carry his burden of proving discriminatory motive by a preponderance of the evidence and for a jury to find in his favor it would have to indulge in an impermissible speculation. The trial court properly granted judgment n.o.v. on Coburn's ADEA claim.

THE TITLE VII CLAIM

Our review of Coburn's Title VII sex discrimination cause of action is much more limited. Because the trial court acted as a trier of fact, we must affirm his findings unless they are "clearly erroneous". Fed. R. Civ. P. 52(a). Coburn's appeal of the Title VII judgment hinges on evidentiary rulings made by the trial court. While the court was restrictive on the evidence allowed in, we are unable to say the court abused its considerable discretion. On the state of the record, we are not "left with the definite and firm conviction that a mistake has been committed". *United States* v. *Gypsum*, 333 U.S. 364, 395 (1948). We are convinced that the trial court's rulings on the Title VII claim are not clearly erroneous.

CONCLUSION

We affirm the trial court's grant of judgment n.o.v. on Coburn's ADEA claim. Because of our holding we need not rule on the companion issues of the conditional granting of a new trial, the refusal to reinstate Coburn, and the denial of liquidated damages. We also affirm the judgment for Pan Am on the Title VII claim.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1543 September Term, 19 82

Civil Action No. 81-01086

Peter D. Coburn
Appellant

v.

Pan American World Airways, Inc.
Appellee

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 29 1983

GEORGE A. FISHER
CLERK

BEFORE: Tamm and Wilkey, Circuit Judges; and McNichols*, Senior District Judge, U. S. District Court for the District of Idaho

ORDER

On consideration of the Petition for Rehearing of Appellant, filed July 19, 1983, it is

ORDERED by the Court that the aforesaid Petition is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, CLERK

BY: Daniel M. Cathey
First Deputy Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §294(d).

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1543 September Term, 19 82

Civil Action No. 81-01086

Peter D. Coburn
Appellant

v.

Pan American World Airways, Inc.
Appellee

United States Court of Appeals
for the District of Columbia Circuit

FILED JUL 29 1983

GEORGE A. FISHER
CLERK

BEFORE: Robinson, Chief Judge; Wright, Tamm, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, Circuit Judges; and McNichols*, Senior District Judge, U. S. District Court for the District of Idaho

O R D E R

The Suggestion for Rehearing en banc of Appellant, filed July 19, 1983, has been circulated to the full Court and no member has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court en banc, that the aforesaid Suggestion is denied.

Per Curiam

For the Court:

GEORGE A. FISHER, CLERK

BY: Daniel M. Cathey
First Deputy Clerk

*Sitting by designation pursuant to Title 28 U.S.C. §294(d).

Office - Supreme Court, U.S.
FILED
OCT 26 1983
ALEXANDER L. STEVAS
CLERK

No. 83-528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PETER D. COBURN,
Petitioner,
v.
PAN AMERICAN WORLD AIRWAYS, INC.,
Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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ATTORNEYS FOR PETITIONER

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United States District Court
for the District of Columbia

PETER D. COBURN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 81-1086
	)	
PAN AMERICAN WORLD AIRWAYS, INC.,	)	FILED
	)	MAY 7, 1982
Defendant.	)	JAMES F. DAVEY, Clerk

MEMORANDUM OPINION

Plaintiff brings this action against Pan American World Airways claiming employment discrimination on the basis of age.[1] On September 11, 1981, this Court issued a Memorandum Opinion which dismissed all of plaintiff's claims of age discrimination except for those under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, premised on acts which occurred after October 30, 1979. The ADEA claim which remains in the case is premised on defendant's termination of plaintiff's employment on August 31, 1980.

A trial by jury on plaintiff's ADEA action began on March 16, 1982. At the close of plaintiff's case, and again at the close of all the evidence, defendant moved for a directed verdict. In both instances, we denied defendant's motion

[1] Plaintiff also claims employment discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*. Contemporaneous with this Memorandum Opinion we have issued Findings of Fact and Conclusions of Law in plaintiff's Title VII action. As the events which form the basis of plaintiff's ADEA and Title VII claims are the same, we incorporate those Findings of Fact in this Memorandum Opinion.

without prejudice.[2] On March 19, 1982, the jury returned a verdict in favor of plaintiff, finding that the termination of plaintiff's employment resulted from willful age discrimination by defendant. On April 2, 1982, we entered judgment in accordance with the jury's verdict.

Defendant moves for judgment notwithstanding the verdict, or, in the alternative, for a new trial. For the reasons which follow, we grant defendant's motion for judgment notwithstanding the verdict and deny its alternative motion for a new trial.

DISCUSSION

I. Standard of Review

We are mindful that a trial court must enter judgment contrary to the verdict of a duly constituted jury only when the court concludes that "the evidence, together with all inferences that can reasonably be drawn therefrom is so one-sided that reasonable men could not disagree on the verdict." *Vander Zee* v. *Karabatsos*, 589 F.2d 723, 726 (D.C. Cir. 1978); *Murphy* v. *United States*, 653 F.2d 637, 640 (D.C. Cir. 1981). The evidence and accompanying inferences must be viewed in the light most favorable to the non-moving party, *Mattivi* v. *South African Marine Corp., "Huguenot"*, 618 F.2d 163, 167-68 (2d Cir. 1980), and if "fair-minded" jurors in the exercise of "impartial judgment" might disagree on the conclusion to be drawn from that evidence, the court must not grant judgment notwithstanding the verdict. *Boeing Company* v. *Shipman*, 411 F.2d 365, 374 (5th Cir. 1969).

The jury's verdict, however, must be based on more than mere speculation to withstand a motion for judgment

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[2] While this Court was inclined to grant defendant's motion for a directed verdict, in the interest of judicial efficiency we reserved decision on the motions to allow the case to go to the jury. *Mattivi* v. *South African Marine Corp. "Huguenot"*, 618 F.2d 163, 169 (2d Cir. 1980); *Law* v. *Virginia Stage Lines, Inc.*, 444 F.2d 990, 995 (D.C. Cir. 1971).

notwithstanding the verdict. *Moore* v. *Chesapeake and Ohio Railway Co.*, 340 U.S. 573, 578 (1951). It is vulnerable to such an attack if it "could only have been the result of sheer surmise and conjecture." *Mattivi, supra*, at 168. A mere scintilla of evidence is not enough to support a decision of a jury. *Tackett* v. *Kidder*, 616 F.2d 1050, 1053 (8th Cir. 1980). Instead, "substantial" evidence must underlie the verdict. *Gehrhardt* v. *General Motors Corporation*, 581 F.2d 7, 14 (2d Cir. 1978).

II. Plaintiff's ADEA Claims

Section 623(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1), provides

> It shall be unlawful for an employer – (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

An age discrimination claimant must satisfy a two-step process to establish an entitlement to recovery under the ADEA. First, plaintiff must prove all the elements of a prima facie case of discrimination. The burden then shifts to defendant to present some "legitimate, non-discriminatory reason for the employee's rejection." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802 (1973). If defendant does so, the second step which plaintiff must handle is to prove that by a preponderance of the evidence, "the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248, 253 (1981). We conclude that the evidence presented at trial, and all inferences which can be derived therefrom, cannot support a jury verdict that plaintiff has established a prima facie case of discrimination. Further, even assuming that the jury could properly conclude that plaintiff has proved its prima facie case, the evidence is insufficient to support a jury finding that defendant's reasons for terminating plaintiff's employment were but a pretext for discrimination.

A. Prima Facie Case

The Supreme Court has identified the relevant factors which combine to create a prima facie case of discrimination under Title VII. *Texas Department of Community Affairs, supra*, at 253-54; *McDonnell, supra*, at 802. In *McDonnell*, the court concluded that plaintiff had to establish,

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell, supra at 802.

In *McDonnell*, the Court observed that the elements of a prima facie case will vary depending upon the particular circumstances of the Title VII claim. *McDonnell, supra*, at 802 n. 13. However, the basic framework for a prima facie case of discrimination under Title VII applies fully to a claim of age discrimination under the ADEA. *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1010 (1st Cir. 1979).

To establish a prima facie case of discrimination resulting from a dismissal pursuant to a reduction-in-force, a claimant must prove by a preponderance of the evidence that (1) he was within a class protected by the ADEA, (2) he performed his job satisfactorily and (3) he was discharged under circumstances which give rise to an inference of unlawful discrimination. *Douglas* v. *Anderson*, 656 F.2d 528, 531 (9th Cir. 1981). Direct evidence of discriminatory motive on the part of defendant is not necessary for a prima facie showing. *Daye* v. *Harris*, 655 F.2d 258, 262 (D.C. Cir. 1981). Yet, plaintiff must present some evidence, be it direct or circumstantial, from which a jury may infer that unlawful discrimination was a likely cause of the dismissal. *Douglas, supra*, at 532.[3] Without doubt,

[3] Plaintiff contends that under *Daye* v. *Harris, supra*, no evidence beyond the membership of plaintiff in the statutorily protected class,

plaintiff established the first two elements of a prima facie case: he comes within the class protected by the ADEA, and during his employment with Pan American he performed satisfactorily. However, the record is utterly devoid of evidence of any type from which a reasonable juror could infer that a likely cause of plaintiff's termination was his age.[4] The evidence demonstrates only that defendant, as a part of a company wide reduction-in-force, conducted a comparative assessment of the four Reservations Supervisors in its Washington, D.C. office. As a result of that "peer group analysis," it concluded that plaintiff was the least competent performer. One of the Reservations Supervisors retained by defendant, Mualla Peck,

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and his performance of satisfactory work, need be shown to infer that discrimination motivated defendant's decision to dismiss plaintiff. *Daye*, however, holds only that direct evidence is not necessary to the establishment of a prima facie case. It does not stand for the proposition that circumstantial evidence is also unnecessary. Under *Texas Department of Community Affairs, supra*, decided by the Supreme Court subsequent to the Court of Appeals decision in *Daye*, plaintiff must show "circumstances which give rise to an inference of unlawful discrimination" to prove his prima facie case. If such an inference is automatic upon the simple showing of membership in a protected class and satisfactory work performance, it would render superfluous the requirement that the circumstances give rise to an inference of discrimination. Clearly, some evidence is necessary upon which to base such an inference beyond a simple showing of the first two elements of the prima facie case.

[4] In denying defendant's motion for summary judgment, we concluded that plaintiff, for purposes of that motion, had made out a prima facie case. At that time, we noted that the applicable test was first an assumption that all of plaintiff's allegations are true, and second, an analysis of whether those presumptively true facts make out a prima facie case of age discrimination. In the present posture of this case we apply a different test: Judgment n.o.v. will be granted only if "the evidence, together with all inferences that can reasonably be drawn therefrom is one-sided that reasonable men could not disagree on the verdict." *Vander Zee, supra*, at 726. We need not accept all of plaintiff's allegations as true, as in the summary judgment context, but we instead examine whether substantial evidence provided at trial, as well as all permissible inferences derived therefrom, supports the verdict of the jury. *Tackett supra*, at 1053. As set forth in more detail above, we conclude that no reasonable jury could find that plaintiff made out a prima facie case of age discrimination.

was substantially older than plaintiff. Moreover, the uncontradicted evidence indicates that plaintiff actually received additional points in the peer group analysis for being over forty years of age. Although several months after plaintiff's discharge the number of Reservations Supervisors was increased, there is no dispute that the increase resulted from the merger of the National Airlines office with that of Pan American.

None of the evidence presented in this case is conducive to the inference that plaintiff was terminated because of his age. For a jury to so infer, it would have to resort to "sheer surmise and conjecture," an insufficient basis to support a verdict. *Mattivi, supra*, at 168.

B. Defendant's Articulated Reason for Terminating Plaintiff's Employment

Even assuming that the evidence was sufficient for the jury to conclude that plaintiff had established a prima facie case of discrimination, we hold that the verdict must be set aside. Defendant articulated a legitimate, nondiscriminatory reason for dismissing plaintiff, and insufficient evidence was presented to demonstrate that defendant's articulated reason was merely a pretext for discrimination. *Texas Department of Community Affairs, supra*, at 254-56.

Defendant contends that plaintiff's employment was terminated only after defendant conducted a peer group analysis pursuant to established Pan American procedures in which plaintiff was compared with other employees in the same area having the same job description and performing essentially the same job functions. Dismissal of admittedly satisfactory employees resulted from a reduction-in-force made necessary by severe financial difficulties which Pan American experienced at that time. Plaintiff attacks various "inaccuracies and inconsistencies" in the analysis but fails to present any evidence from which a juror could conclude or infer that any discriminatory animus underlay the comparative process by which defendant reached its decision.

> While an employer's judgment or course of action may seem poor or erroneous to outsiders, the relevant question is simply whether the given reason was a pretext for illegal discrimination . . . . An employer is entitled to make his own policy and business judgments, and may, for example, fire an adequate employee if his reason is to hire one who will be even better, as long as this is not a pretext for discrimination.

Loeb v. *Textron, supra*, at 1012 n. 6.

In other words, as this court has previously observed in the context of a Title VII action, "an employer may make an employment decision for a good reason, a bad reason, or no reason at all," so long as impermissible discriminatory distinctions do not influence that decision. *Winston* v. *Smithsonian Science Information Exchange, Inc.*, 437 F. Supp. 456, 473 (D.D.C. 1977).

In the present case, the jury's determination that the process defendant utilized to dismiss plaintiff was a pretext for age discrimination has no evidentiary support and is wholly speculative. No reasonable juror could conclude that plaintiff has proven such an assertion by a preponderance of the evidence.

CONCLUSION

Peter Coburn's story appeals to the sympathy of this Court, as it apparently did to the jury. The record reflects that Mr. Coburn devoted long years of service to Pan American and derived justified pride from that effort. Yet it must not be forgotten that the law under which plaintiff brings suit provides for recovery only in the event that defendant terminated plaintiff's employment because of his age. Neither the Court nor the jury may find for the plaintiff in order to reward past services to defendant or because of some general feeling that plaintiff deserved better from his longstanding employer. "[T]he question for the jury was not whether plaintiff was

treated fairly but whether discrimination occurred." *Sahadi* v. *Reynolds Chemical*, 636 F.2d 1116, 1117 (6th Cir. 1980).

The record simply is devoid of any indication that discriminatory animus on the basis of age played a part in defendant's decision to terminate plaintiff's employment. Reluctantly, we are compelled to grant judgment for defendant notwithstanding the verdict rendered by the jury. We deny defendant's motion in the alternative for a new trial.

An order consistent with the foregoing has been entered this day.

John H. Pratt
United States District Judge

May 7, 1982

United States District Court
for the District of Columbia

PETER D. COBURN,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 81-1086
	)	
PAN AMERICAN WORLD AIRWAYS, INC.,	)	FILED
	)	MAY 7, 1982
Defendant.	)	JAMES F. DAVEY, Clerk

JUDGMENT

Upon consideration of defendant's motion for judgment notwithstanding the verdict rendered by the jury in the above captioned case on March 19, 1982 and pursuant to which a judgment of this Court was entered on April 2, 1982, or in the alternative for a new trial, the memoranda of points and authorities in support and opposition thereto, and the entire record herein, it is by the Court this 7th day of May, 1982,

ORDERED, ADJUDGED AND DECREED that defendant's motion for judgment notwithstanding the verdict is granted, the judgment of this Court entered on April 2, 1982 is vacated, and judgment is entered in favor of the defendant, and it is

FURTHER ORDERED that defendant's motion in the alternative for a new trial is denied, and it is

FURTHER ORDERED that plaintiff's motions for additional back wages, prejudgment interest, reinstatement, and liquidated damages are denied.

John H. Pratt
United States District Judge

Office - Supreme Court, U.S.
FILED
OCT 27 1983
L. STEVAS,
CLERK

No. 83-528

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

PETER D. COBURN,

Petitioner,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

In a civil action alleging age discrimination in employment, was the employer's motion for judgment n.o.v. properly granted where (1) plaintiff proved merely that he was 43 years of age, was qualified for the position in which he was employed, and was discharged during a general reduction-in-force while some younger employees were retained and others were later promoted, and (2) the trial court found that reasonable jurors could not have concluded, on the basis of all the evidence, that intentional age discrimination occurred?

LIST OF PARTIES

The names of all parties to the proceeding are contained in the caption.

Respondent Pan American World Airways, Inc. has no parent company. Other than wholly-owned subsidiaries, the subsidiaries and affiliates of respondent are:

Company	Incorporated Under Laws Of
Acerias Paz del Rio, S.A.	Colombia
Aeronautical Radio, Inc.	Delaware
Agropecuaria Fluminense, S.A.	Brazil
Air Cargo, Inc.	Delaware
Air Carrier Supply, Inc.	Florida
Airline Tariff Publishing Co.	District of Columbia
Ariana Afghan Airlines, Ltd.	Afghanistan
Companhia Hoteleira Novos Horizontes, S.A.	Brazil
Delsud Inversora, S.R.L.	Argentina
Escola Americana de Rio de Janeiro	Brazil
Hadrian, Ltd.	Bermuda
Honolulu Fueling Facilities Corp.	Hawaii
International Aeradio (Caribbean) Ltd.	Trinidad
Liberian Development Corp.	Liberia
Manhattan Air Terminal, Inc.	New York
New York Airways, Inc.	Delaware
Private Investment Company for Asia, S.A.	Panama
Promotora de Hoteles de Turismo Medellin, S.A.	Colombia
Radio Aeronautica Paraguaya, S.A.	Paraguay
Social Immobiliaria Norte America, S.A.	Argentina
Societe International de Telecommunications Aeronautiques	Belgium

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-528

PETER D. COBURN,

Petitioner,

v.

PAN AMERICAN WORLD AIRWAYS, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

The respondent, Pan American World Airways, Inc., respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the decision of the District of Columbia Circuit in this case.

OPINIONS BELOW

The June 28, 1983 opinion of the Court of Appeals is reported at 711 F.2d 339 and appears in the Appendix to the petition ("Pet. App.") at p. 1. The July 29, 1983 orders of the Court of Appeals denying rehearing and rehearing en banc appear in the Appendix to the petition at pp. 11-12.

The May 7, 1982 memorandum opinion and judgment of the District Court, which granted respondent's motion for judgment n.o.v., are unreported. Because they are not included in the appendix to the petition, respondent has reproduced them in Respondent's Appendix to this brief ("Resp. App."), at pp. 1a and 10a. The District Court's September 28, 1982 order restating the grant of judgment n.o.v., and conditionally granting respondent's alternative motion for a new trial, is reproduced in Respondent's Appendix at p. 12a.

JURISDICTION

The opinion of the Court of Appeals was entered on June 28, 1983. The orders denying rehearing and rehearing en banc were entered on July 29, 1983. The petition for a writ of certiorari was filed on September 27, 1983. Jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

The petition seeks review of an opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit affirming the District Court's grant of respondent's motion for judgment notwithstanding the verdict, pursuant to Rule 50(b), Fed. R. Civ. P., in a civil action brought by petitioner under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* ("ADEA").

Proceedings In the District Court

Petitioner, who had been employed by respondent for 16 years in various management positions, was discharged

from his employment in August, 1980, during a worldwide reduction-in-force carried out by respondent, a corporation in serious financial trouble. Petitioner was 43 years old at the time.

Petitioner brought a civil action in the United States District Court for the District of Columbia, contending that his discharge resulted from age discrimination violative of ADEA. He amended his complaint to state an additional claim of sex discrimination violative of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* ("Title VII"). In March, 1982, petitioner's ADEA claim was tried to a jury, while the court conducted a simultaneous bench trial of the Title VII claim. Respondent moved for a directed verdict at the close of petitioner's case and again after all the evidence had been presented; both motions were denied. The jury returned a verdict for petitioner on the ADEA claim and awarded him $26,820 in damages. The court, however, announced that it would enter judgment for respondent on the Title VII claim.

Respondent filed a timely motion for judgment n.o.v. on the ADEA claim, pursuant to Rule 50(b), Fed. R. Civ. P. The District Court granted the motion, finding that petitioner had failed to present substantial evidence to establish a prima facie case of discrimination within the meaning of *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), and *Texas Department of Community Affairs* v. *Burdine,* 450 U.S. 248 (1981), and that, even if petitioner had established his prima facie case, respondent had articulated a legitimate nondiscriminatory reason for its treatment of petitioner, and petitioner had failed to present substantial evidence on the basis of which a reasonable jury could have found that respondent's explanation

was a pretext for intentional discrimination. (Resp. App. at 4a, 7a, 8a.)[1] The court also concluded that "[n]one of the evidence presented in this case is conducive to the inference that [petitioner] was terminated because of his age" (Resp. App. at 7a), and that "[t]he record simply is devoid of any indication that discriminatory animus on the basis of age played a part in [respondent's] decision to terminate [petitioner's] employment" (Resp. App. at 9a).

The material evidence presented to the jury was undisputed. For more than one year prior to his discharge, petitioner was one of four "Reservations Supervisors" working in respondent's Washington, D.C. Reservations and Ticket Office. The Reservations Supervisors were salaried, nonunion management employees who were responsible for supervising the work of unionized sales agents who answer telephones and make reservations for passengers on respondent's airline, using computer terminals connected to a computerized reservations system. Petitioner's primary day-to-day job assignment consisted of supervising a "Reservations Operations Center," in which he monitored a central telephone console and routed incoming calls to available sales agents. (Tr. 80-87, 734.)[2]

During 1980, respondent's financial condition deteriorated to the point where the company's ability to survive was in issue, and respondent's senior management instituted a number of severe economy measures, which included the sale of respondent's major nonoperating as-

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[1]Petitioner now misreads the District Court's opinion, twice asserting incorrectly that the District Court found only "that petitioner had failed to establish a prima facie case of age discrimination." (Pet. at 2, 5.)

[2]Citations in the form "Tr." refer to the trial transcript.

sets, cutbacks in airline service, a general wage reduction, and a management reduction-in-force. Under the reduction-in-force, each corporate department was required to reduce its management staff by 15% in August, 1980. If a department failed to achieve this reduction as the result of transfers, resignations, and retirements (including voluntary early retirements), the department was required to select additional management employees for involuntary separation. (Tr. 250-52, 510-19, 736.)

During the course of the reduction-in-force, the manager of respondent's Washington, D.C. Reservations and Ticket Office was instructed to recommend one management employee for involuntary separation. (Tr. 574-76.) Following respondent's written procedures "to the letter" (Pet. App. at 7), the office manager then designated a "peer group" consisting of all four Reservations Supervisors working in the Reservations and Ticket Office, and completed a written "peer group analysis" in which the qualifications, abilities, and productivity of each of the peer group members were evaluated in comparative terms. Petitioner ranked lowest in the peer group, even though in accordance with respondent's policy he received *extra* credit in the peer group analysis for being more than 40 years old.[3] Accordingly, the office manager recommended petitioner for separation, and he was in fact discharged, effective August 31, 1980. (Tr. 575-83, 596-98, 610-15, 736-38.)

[3]The three other members of the peer group were 37, 39, and 51 years old. (Pltf's Ex. 15.) All were retained.

When petitioner was discharged, his position ceased to exist. No one replaced him as a Reservations Supervisor, and his job duties were split up among the remaining Reservations Supervisors. (Tr. 463, 665-66.) Several months later, respondent's reservations system was combined with that of National Airlines, a company that respondent had acquired early in 1980. Respondent's Washington, D.C. Reservations and Ticket Office was expanded to include a number of former National Airlines reservations agents and supervisors, who had become employees of respondent. Following the office consolidation, several management employees, including former National Airlines employees, were promoted, transferred, or reclassified without promotion. (Tr. 560-74.)[4]

There was no disagreement at trial regarding petitioner's qualifications to work in the position of Reservations Supervisor. Six months prior to his discharge he had received an annual job performance rating of "Good" (though he was also rated the poorest performer of the four Reservations Supervisors, in comparative terms). (Tr. 630, 735-36.) When petitioner was discharged, the cause was not an inability to perform his job duties, but rather the simple

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[4]Petitioner's discharge also occurred during a period in which respondent's management workforce was being substantially cut back. Prior to the August, 1980 reduction-in-force, the separate Pan Am and National Airlines reservations offices included a total of 185 sales agents and 10 management employees. By August, 1981, the consolidated Reservations and Ticket Office employed 191 unionized sales agents and only 6 management employees. Between June and December, 1980, the total number of management employees in the "region" that included petitioner's office declined from 80 to 58. There were no management vacancies in the region after petitioner's termination. (Tr. 430, 540-43, 560-74.)

fact that in the peer group analysis he received the lowest rating of any Reservations Supervisor.

Petitioner produced no direct evidence of discriminatory animus, but merely expressed his disagreement with the outcome of the peer group analysis and with the business judgments that led to his discharge.[5] At no time has petitioner produced any evidence, direct or circumstantial, suggesting that any officer or employee of respondent treated petitioner adversely because of his age, or even took his age into account at all – except as a basis for giving him extra credit in the peer group analysis in accordance with respondent's standard policy.[6]

Respondent's motion for judgment n.o.v. was accompanied by a motion in the alternative for a new trial, which

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[5]Throughout this litigation, petitioner has substituted arguments for evidence and then attempted to premise inferences of discrimination on his own arguments. In this Court, for example, petitioner incorrectly asserts that "the jury had heard" that petitioner's peer group was incorrectly constituted under respondent's guidelines for the reduction-in-force. (Pet. at 7.) In fact, the jury heard no such testimony; it was undisputed in the evidence that respondent's guidelines were followed in connection with the peer group analysis and petitioner's discharge. (Tr. 443.) Both the trial court and the Court of Appeals so held.

[6]Petitioner is incorrect when he asserts (Pet. at 5) that the proffered testimony of one William Ferchak, which was excluded by the District Court, had any bearing on petitioner's age discrimination claim. Ferchak's testimony would have concerned only petitioner's Title VII claim of sex discrimination, which is not before this Court. Indeed, petitioner's counsel expressly stated at trial that Ferchak's proffered testimony "only goes to the sex claim" and "has nothing to do with the jury deliberations, or any of the issues that would be resolved concerning the age claim" (Tr. 584-85), and that she did not propose to have Ferchak testify before the jury (Tr. 200/F). The exclusion of this testimony was challenged by petitioner on appeal and was affirmed by the Court of Appeals. (Pet. App. at 10.)

was conditionally granted by the District Court on September 28, 1982. (Resp. App. at 12a.)[7]

The Decision Of The Court Of Appeals

The Court of Appeals approved the District Court's use of the *McDonnell Douglas* "evidentiary guidelines" to allocate the order and burdens of proof. (Pet. App. at 4.) Disagreeing with the District Court, however, the Court of Appeals concluded that petitioner had made out a *McDonnell Douglas* prima facie case by showing simply that (1) he was 43 years old, (2) he was qualified as a Reservations Supervisor, and (3) he was dismissed, while (4) younger employees were retained and others later promoted. (Pet. App. at 6.)

The Court of Appeals correctly recognized that this minimal showing did not resolve the ultimate issue presented by respondent's motion for judgment n.o.v., which was "whether reasonable jurors could have decided on the basis of the evidence at trial that [petitioner's] age was a determining factor in [respondent's] decision to fire him." (Pet. App. at 5.) The court acknowledged that it would be relatively easy for an employee discharged in a general reduction-in-force to make a first-stage *McDonnell Douglas* showing, but stated that in its view "the exigencies of a reduction-in-force can best be analyzed at the stage

[7]The District Court had originally denied the alternative new trial motion. (Resp. App. at 10a.) On respondent's motion, the Court of Appeals remanded petitioner's appeal to permit the District Court to reconsider its denial of the new trial motion. On reconsideration, the District Court entered its September 28, 1982 order restating the grant of judgment n.o.v. and conditionally granting the alternative motion for a new trial. (Resp. App. at 12a.) The order of September 28, 1982 was affirmed by the Court of Appeals in its decision of June 28, 1983.

where the employer puts on evidence of a nondiscriminatory reason for the firing. In this manner the employee always retains the burden of proving discrimination while the employer's situation is analyzed on a case-by-case basis." (Pet. App. at 7.)

The Court of Appeals then considered and rejected each of petitioner's attempts to premise an inference of intentional age discrimination on speculation or argument rather than evidence. Thus, the court found there was *no evidence* that a disproportionate number of older employees had been terminated in the reduction-in-force (Pet. App. at 8), *no evidence* that might justify an inference of age-discriminatory animus based on respondent's voluntary early retirement program (*id.*), *no evidence* that petitioner's "peer group" was improperly constituted under respondent's procedures (*id.* at 9), *no evidence* that the peer group analysis was manipulated to petitioner's disadvantage or that petitioner's rating in the peer group analysis was inconsistent with his earlier performance assessment (*id.*), and *no evidence* that the promotion of other employees indicated discrimination against petitioner (*id.*). Finding the record "devoid of any evidence" that age was a determining factor in petitioner's termination, the Court of Appeals affirmed the grant of judgment n.o.v. (*Id.* at 10.)

ARGUMENT

THE DECISION OF THE COURT OF APPEALS IS PLAINLY CONSISTENT WITH PRIOR DECISIONS OF THIS COURT AND PRESENTS NO IMPORTANT ISSUES FOR REVIEW.

1. The very decision on which petitioner relies, *United States Postal Service Board of Governors* v. *Aikens,* 103 S.Ct. 1478 (1983) ("*Aikens*"), makes clear that this case was correctly decided by the Court of Appeals and presents no important issues for review in this Court. *Aikens* confirms that whether or not an employment discrimination lawsuit is tried under the procedure of *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973) ("*McDonnell Douglas*"), the ultimate issue at all times is whether intentional discrimination occurred, and that as to this issue, the plaintiff always retains the burden of persuasion. *Aikens, supra,* at 1482. *Aikens* teaches that in deciding such a case after it has been fully tried, the trier of fact must consider the totality of the evidence, deciding the ultimate issue of intentional discrimination "directly, just as district courts decide disputed questions of fact in other civil litigation." *Id.* (footnote omitted). And *Aikens* also teaches that neither "trial courts [n]or reviewing courts should treat discrimination differently from other ultimate questions of fact," and that in deciding whether the evidence presented at trial supports a finding of discrimination, the courts should simply not apply "legal rules which were devised to govern the 'allocation of burdens and order of presentation of proof.' " *Id., quoting Texas Department of Community Affairs* v. *Burdine,* 450 U.S. 248, 252 (1981) ("*Burdine*").

The special significance of the *McDonnell Douglas* prima facie case is that it generates a presumption of un-

lawful discrimination and imposes on the defendant, if it is to avoid a judgment against it, an obligation to articulate through admissible evidence a legitimate nondiscriminatory reason for its actions. *Burdine, supra,* 450 U.S. at 254-55. But *Burdine* held, and *Aikens* confirms, that once the employer has responded to the prima facie case and sustained its burden of production, "the factual inquiry proceeds to a new level of specificity." *Burdine, supra,* 450 U.S. at 255. The presumption of discrimination "drops from the case;" the "legally mandatory inference of discrimination arising from the plaintiff's initial evidence" is destroyed. *Id.* at 255 n.10. The plaintiff's initial evidence and all inferences properly drawn therefrom may of course be considered in deciding the ultimate question of discrimination, *id.*, but neither that evidence nor any properly derived inferences possess any special significance by virtue of their earlier relationship to plaintiff's prima facie case. Once the factual inquiry has moved to the "new level of specificity," the question whether the plaintiff previously established a prima facie case "is no longer relevant." *Aikens, supra,* 103 S.Ct. at 1482.

Petitioner contends that the plaintiff's proof of a prima facie case at some point during a trial completely insulates a subsequent jury verdict from review on defendant's motion for judgment n.o.v. Far from supporting his proposition (as petitioner maintains), *Aikens* precludes its acceptance. Indeed, it has been apparent at least since *Burdine* that the decision of the trier of fact on the ultimate factual question of employment discrimination is subject to ordinary standards of review. *Cf. Pullman-Standard* v. *Swint,* 456 U.S. 273 (1982) ("clearly erroneous" standard of Rule 52(a) applies to finding of discriminatory intent under § 703(h) of Title VII).

In *Aikens,* the Court expressed its surprise at finding the parties still debating, after the completion of a full trial, whether plaintiff had made out his prima facie case. *Aikens, supra,* 103 S.Ct. at 1481. Here, petitioner similarly has fastened on the wrong question. In considering respondent's motion for judgment n.o.v., the question to be answered is whether the record evidence is such that "there can be but one reasonable conclusion as to the verdict." *Brady* v. *Southern Ry.,* 320 U.S. 476, 479 (1943). *See Moore* v. *Chesapeake & Ohio Ry.,* 340 U.S. 573, 578 (1951) ("Speculation cannot supply the place of proof."). The two courts below have correctly answered that question, concluding on the basis of all the evidence that no reasonable jury could have found intentional discrimination in this case.

2. This case in any event does not provide an appropriate occasion for consideration of petitioner's argument that establishment of the prima facie case *always* excludes the possibility of judgment n.o.v. The case is complicated by the Court of Appeals' deliberate adoption of a minimal, undemanding formulation of the prima facie case.

Presented with the need to examine an individual employment action that took place during the course of a general reduction-in-force affecting many employees, the Court of Appeals expressly decided to define the prima facie case in minimal terms so that the ultimate factual question of unlawful discrimination might readily be reached and decided. Virtually every employee who is separated in a reduction-in-force and is in the protected age group will be able to make out a prima facie case as the Court of Appeals now defines it, since virtually every such person will be able to prove that he was qualified for the job he held but lost it while some younger employee was

retained. Respondent objected below to any formulation of the prima facie case in such terms. The Court of Appeals was persuaded, however, that "the exigencies of a reduction-in-force can best be analyzed" when the employer's defense is articulated and tested, following establishment of the prima facie case. (Pet. App. at 7.)

The approach adopted by the Court of Appeals is uncommonly generous to ADEA plaintiffs. Other Circuits have declined to rule that prima facie ADEA cases were made out on the basis of evidentiary showings similar to the showing made by petitioner in this case, precisely because such meager evidence provides no reasonable foundation for an inference of unlawful age discrimination. *E.g., Williams* v. *General Motors Corp.*, 656 F.2d 120 (5th Cir. 1981), *cert. denied*, 455 U.S. 943 (1982);[8] *Sahadi* v. *Reynolds Chemical*, 636 F.2d 1116 (6th Cir. 1980) (per curiam). *See Pace* v. *Southern Railway System*, 701 F.2d 1383 (11th Cir. 1983).[9] Indeed, the approach of

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[8]In *Williams* v. *General Motors Corp.*, the Fifth Circuit held that in order to establish a prima facie case based on layoffs occurring during a reduction-in-force, an ADEA plaintiff must establish that (1) he was within the protected age group and was adversely affected by an employment decision; (2) he was qualified to assume another position; and (3) there was "evidence, circumstantial or direct, from which a factfinder might reasonably conclude that the employer intended to discriminate in reaching the decision at issue." 656 F.2d at 129-30. To establish the third element, the plaintiff is required to introduce evidence that "must lead the factfinder reasonably to conclude either (1) the defendant consciously refused to consider retaining or relocating a plaintiff because of his age, or (2) that defendant regarded age as a negative factor in such consideration." *Id.*

[9]In *Pace* v. *Southern Railway System*, decided prior to the decision below, the Eleventh Circuit reviewed a number of leading cases delineating the elements of the prima facie ADEA claim, and concluded that "*in no case* does the court hold that as a matter of law a prima facie case is established if a plaintiff simply shows he is in the

the court below seems inconsistent with the concept that a "*McDonnell Douglas* prima facie showing . . . is . . . proof of actions taken by the employer from which we infer discriminatory animus because experience has proved that in the absence of any other explanation it is more likely than not that those actions were bottomed on impermissible considerations." *Furnco Construction Corp.* v. *Waters,* 438 U.S. 567, 579-80 (1978). It is not, we submit, realistic to say that the minimal prima facie case defined by the Court of Appeals compels an inference of discrimination.

This is, in short, the wrong case in which to consider the question whether a *well-founded* prima facie case would provide absolute protection against the possibility of judgment n.o.v. And it is the wrong case in which to revisit the task of defining the prima facie case itself, since petitioner is satisfied with the definition adopted by the Court of Appeals and respondent is satisfied with that court's ultimate judgment in the case.

3. Contrary to petitioner's suggestion (Pet. at 11, 17), the decision of the Court of Appeals affirming judgment n.o.v. does not conflict with the decision of any other Circuit. The other Circuits have consistently approved directed verdicts or judgments n.o.v. for employers in ADEA lawsuits in which the plaintiffs established (or were assumed to have established) prima facie cases. *E.g., Lovelace* v. *Sherwin-Williams Co.*, 681 F.2d 230 (4th Cir. 1982) (judgment n.o.v.); *Bohrer* v. *Hanes Corp.*, __ F.2d __, 32 FEP Cases (BNA) 1578 (5th Cir., Sept. 23, 1983)

protected group, was adversely affected by an employment decision, was qualified and was replaced by one younger than himself. In each of these cases not only was the plaintiff replaced by someone younger but there was also *other evidence of discrimination based on age.*" 701 F.2d at 1390 (emphasis added).

(affirming judgment n.o.v. and holding that "[p]rima facie proof of age discrimination does not necessarily entitle the plaintiff to a jury determination of his claim");[10] *Halsell* v. *Kimberly-Clark Corp.*, 683 F.2d 285, 291 (8th Cir. 1982) (directed verdict); *Douglas* v. *Anderson*, 656 F.2d 528 (9th Cir. 1981) (directed verdict). *Cf. Kephart* v. *Institute of Gas Technology*, 630 F.2d 1217, 1218 (7th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 959 (1981) (summary judgment for employer is appropriate even if prima facie case is assumed, where "plaintiff had no indications of motive and intent, supportive of his position, to put on the scales for weighing"); *Steckl* v. *Motorola, Inc.*, 703 F.2d 392 (9th Cir. 1983) (establishment of prima facie case does not bar summary judgment for employer).

The three decisions cited by petitioner as evidence of a supposed conflict among the Circuits (Pet. at 11-12) are not on point. In *Spagnuolo* v. *Whirpool Corp.*, 641 F.2d 1109 (4th Cir.), *cert. denied*, 454 U.S. 860 (1981), and *Hagelthorn* v. *Kennecott Corp.*, 710 F.2d 76 (2d Cir. 1983), the plaintiffs did not rely on inferences of discrimination derived from circumstantial evidence through the *McDonnell Douglas* order of proof, but instead introduced *direct* evidence of discriminatory motive; the courts of appeals merely held that those plaintiffs were entitled to have juries weigh their direct evidence together with the employers' competing evidence. Similarly, in *Tribble* v.

[10]In another recent ADEA case similar to the one presented here, the Fifth Circuit has applied *Aikens* and specifically rejected plaintiffs' argument that they were entitled to take their case to the jury on the strength of their basic *McDonnell Douglas* prima facie showing. *Elliott* v. *Group Medical & Surgical Service*, __ F.2d __, 32 FEP Cases (BNA) 1451, 1457 (5th Cir., Sept. 16, 1983). The court also held that "generalized testimony by an employee regarding his subjective belief that his discharge was the result of age discrimination is insufficient to make an issue for the jury in the face of proof showing an adequate, nondiscriminatory reason for his discharge." *Id.*

Westinghouse Electric Corp., 669 F.2d 1193 (8th Cir. 1982), *cert. denied*, 103 S.Ct. 1767 (1983), denial of the employer's motion for judgment n.o.v. was affirmed because "[e]vidence was presented from which the jury could infer that the reason for plaintiff's discharge was age." *Id.*, 669 F.2d at 1196. *See Halsell* v. *Kimberly-Clark Corp.*, 683 F.2d 285, 292 n.6 (8th Cir. 1982) (distinguishing *Tribble*). In contrast, petitioner here acknowledges his inability to present direct evidence of discriminatory motive and argues instead that his proof of a minimal prima facie case assures that his jury verdict must stand even though two courts have held that the record is devoid of evidence from which a reasonable jury could have drawn an inference of discrimination. Petitioner's argument has not, to our knowledge, been adopted by any court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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October, 1983

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETER D. COBURN,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 81-1086
	)	
PAN AMERICAN WORLD AIRWAYS, INC.,	)	
	)	
	)	
Defendant.	)	

MEMORANDUM OPINION

Plaintiff brings this action against Pan American World Airways claiming employment discrimination on the basis of age.[1] On September 11, 1981, this Court issued a Memorandum Opinion which dismissed all of plaintiff's claims of age discrimination except for those under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621 *et seq.*, premised on acts which occurred after October 30, 1979. The ADEA claim which remains in the case is premised on defendant's termination of plaintiff's employment on August 31, 1980.

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[1]Plaintiff also claims employment discrimination on the basis of sex under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* Contemporaneous with this Memorandum Opinion we have issued Findings of Fact and Conclusions of Law in plaintiff's Title VII action. As the events which form the basis of plaintiff's ADEA and Title VII claims are the same, we incorporate those Findings of Fact in this Memorandum Opinion.

A trial by jury on plaintiff's ADEA action began on March 16, 1982. At the close of plaintiff's case, and again at the close of all the evidence, defendant moved for a directed verdict. In both instances, we denied defendant's motion without prejudice.[2] On March 19, 1982, the jury returned a verdict in favor of plaintiff, finding that the termination of plaintiff's employment resulted from willful age discrimination by defendant. On April 2, 1982, we entered judgment in accordance with the jury's verdict.

Defendant moves for judgment notwithstanding the verdict, or, in the alternative, for a new trial. For the reasons which follow, we grant defendant's motion for judgment notwithstanding the verdict and deny its alternative motion for a new trial.

DISCUSSION

I. Standard of Review

We are mindful that a trial court must enter judgment contrary to the verdict of a duly constituted jury only when the court concludes that "the evidence, together with all inferences that can reasonably be drawn therefrom is so one-sided that reasonable men could not disagree on the verdict." *Vander Zee v. Karabatsos,* 589 F.2d 723, 726 (D.C.Cir. 1978); *Murphy v. United States,* 653 F.2d 637, 640 (D.C.Cir. 1981). The evidence and accompanying inferences must be viewed in the light most favorable to the non-moving party, *Mattivi v. South African Marine Corp., "Huguenot,"* 618 F.2d 163, 167-68 (2d Cir. 1980),

[2]While this Court was inclined to grant defendant's motion for a directed verdict, in the interest of judicial efficiency we reserved decision on the motions to allow the case to go to the jury. *Mattivi v. South African Marine Corp. "Huguenot",* 618 F.2d 163, 169 (2d Cir. 1980); *Law v. Virginia Stage Lines, Inc.,* 444 F.2d 990, 995 (D.C.Cir. 1971).

and if "fair-minded" jurors in the exercise of "impartial judgment" might disagree on the conclusion to be drawn from that evidence, the court must not grant judgment notwithstanding the verdict. *Boeing Company v. Shipman,* 411 F.2d 365, 374 (5th Cir. 1969).

The jury's verdict, however, must be based on more than mere speculation to withstand a motion for judgment notwithstanding the verdict. *Moore v. Chesapeake and Ohio Railway Co.,* 340 U.S. 573, 578 (1951). It is vulnerable to such an attack if it "could only have been the result of sheer surmise and conjecture." *Mattivi, supra,* at 168. A mere scintilla of evidence is not enough to support the decision of a jury. *Tackett v. Kidder,* 616 F.2d 1050, 1053 (8th Cir. 1980). Instead, "substantial" evidence must underlie the verdict. *Gehrhardt v. General Motors Corporation,* 581 F.2d 7, 14 (2d Cir. 1978).

II. Plaintiff's ADEA Claims

Section 623(a)(1) of the ADEA, 29 U.S.C. § 623(a)(1), provides

> It shall be unlawful for an employer- (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

An age discrimination claimant must satisfy a two-step process to establish an entitlement to recovery under the ADEA. First, plaintiff must prove all the elements of a prima facie case of discrimination. The burden then shifts to defendant to present some "legitimate, non-discriminatory reason for the employee's rejection." *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973). If

defendant does so, the second step which plaintiff must handle is to prove that by a preponderance of the evidence, "the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981). We conclude that the evidence presented at trial, and all inferences which can be derived therefrom, cannot support a jury verdict that plaintiff has established a prima facie case of discrimination. Further, even assuming that the jury could properly conclude that plaintiff has proved its prima facie case, the evidence is insufficient to support a jury finding that defendant's reasons for terminating plaintiff's employment were but a pretext for discrimination.

A. Prima Facie Case

The Supreme Court has identified the relevant factors which combine to create a prima facie case of discrimination under Title VII. *Texas Department of Community Affairs, supra,* at 253-54; *McDonnell, supra,* at 802. In *McDonnell,* the Court concluded that plaintiff had to establish

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell, supra, at 802.

In *McDonnell,* the Court observed that the elements of a prima facie case will vary depending upon the particular

circumstances of the Title VII claim. *McDonnell, supra,* at 802 n. 13. However, the basic framework for a prima facie case of discrimination under Title VII applies fully to a claim of age discrimination under the ADEA. *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1010 (1st Cir. 1979).

To establish a prima facie case of discrimination resulting from a dismissal pursuant to a reduction-in-force, a claimant must prove by a preponderance of the evidence that (1) he was within a class protected by the ADEA, (2) he performed his job satisfactorily and (3) he was discharged under circumstances which give rise to an inference of unlawful discrimination. *Douglas v. Anderson,* 656 F.2d 528, 531 (9th Cir. 1981). Direct evidence of discriminatory motive on the part of defendant is not necessary for a prima facie showing. *Daye v. Harris,* 655 F.2d 258, 262 (D.C.Cir. 1981). Yet, plaintiff must present some evidence, be it direct or circumstantial, from which a jury may infer that unlawful discrimination was a likely cause of the dismissal. *Douglas, supra,* at 532.[3] Without

[3]Plaintiff contends that under *Daye v. Harris, supra,* no evidence beyond the membership of plaintiff in the statutorily protected class, and his performance of satisfactory work, need be shown to infer that discrimination motivated defendant's decision to dismiss plaintiff. *Daye,* however, holds only that direct evidence is not necessary to the establishment of a prima facie case. It does not stand for the proposition that circumstantial evidence is also unnecessary. Under *Texas Department of Community Affairs, supra,* decided by the Supreme Court subsequent to the Court of Appeals decision in *Daye,* plaintiff must show "circumstances which give rise to an inference of unlawful discrimination" to prove his prima facie case. If such an inference is automatic upon the simple showing of membership in a protected class and satisfactory work performance, it would render superfluous the requirement that the circumstances give rise to an inference of discrimination. Clearly, some evidence is necessary upon which to base such an inference beyond a simple showing of the first two elements of the prima facie case.

doubt, plaintiff established the first two elements of a prima facie case: he comes within the class protected by the ADEA, and during his employment with Pan American he performed satisfactorily. However, the record is utterly devoid of evidence of any type from which a reasonable juror could infer that a likely cause of plaintiff's termination was his age.[4] The evidence demonstrates only that defendant, as a part of a company wide reduction-in-force, conducted a comparative assessment of the four Reservations Supervisors in its Washington, D.C. office. As a result of that "peer group analysis," it concluded that plaintiff was the least competent performer. One of the Reservations Supervisors retained by defendant, Mualla Peck, was substantially older than plaintiff. Moreover, the uncontradicted evidence indicates that plaintiff actually received additional points in the peer group analysis for being over forty years of age. Although several months after plaintiff's discharge the number of Reservations Supervisors was increased, there is no dispute that the increase resulted from the merger of the National Airlines office with that of Pan American.

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[4]In denying defendant's motion for summary judgment, we concluded that plaintiff, for purposes of that motion, had made out a prima facie case. At that time, we noted that the applicable test was first an assumption that all of the plaintiff's allegations are true, and second, an analysis of whether those presumptively true facts make out a prima facie case of age discrimination. In the present posture of this case we apply a different test: Judgment n.o.v. will be granted only if "the evidence, together with all inferences that can reasonably be drawn therefrom is one-sided that reasonable men could not disagree on the verdict." *Vander Zee, supra,* at 726. We need not accept all of plaintiff's allegations as true, as in the summary judgment context, but we instead examine whether substantial evidence provided at trial, as well as all permissible inferences derived therefrom, supports the verdict of the jury. *Tackett, supra,* at 1053. As set forth in more detail above, we conclude that no reasonable jury could find that plaintiff made out a prima facie case of age discrimination.

None of the evidence presented in this case is conducive to the inference that plaintiff was terminated because of his age. For a jury to so infer, it would have to resort to "sheer surmise and conjecture," an insufficient basis to support a verdict. *Mattivi, supra,* at 168.

B. Defendant's Articulated Reason for Terminating Plaintiff's Employment

Even assuming that the evidence was sufficient for the jury to conclude that plaintiff had established a prima facie case of discrimination, we hold that the verdict must be set aside. Defendant articulated a legitimate, non-discriminatory reason for dismissing plaintiff, and insufficient evidence was presented to demonstrate that defendant's articulated reason was merely a pretext for discrimination. *Texas Department of Community Affairs, supra,* at 254-56.

Defendant contends that plaintiff's employment was terminated only after defendant conducted a peer group analysis pursuant to established Pan American procedures in which plaintiff was compared with other employees in the same area having the same job description and performing essentially the same job functions. Dismissal of admittedly satisfactory employees resulted from a reduction-in-force made necessary by severe financial difficulties which Pan American experienced at that time. Plaintiff attacks various "inaccuracies and inconsistencies" in the analysis but fails to present any evidence from which a juror could conclude or infer that any discriminatory animus underlay the comparative process by which defendant reached its decision.

> While an employer's judgment or course of action may seem poor or erroneous to outsiders,

> the relevant question is simply whether the given reason was a pretext for illegal discrimination . . . . An employer is entitled to make his own policy and business judgments, and may, for example, fire an adequate employee if his reason is to hire one who will be even better, as long as this is not a pretext for discrimination.

Loeb v. Textron, supra, at 1012 n. 6.

In other words, as this court has previously observed in the context of a Title VII action, "an employer may make an employment decision for a good reason, a bad reason, or no reason at all," so long as impermissible discriminatory distinctions do not influence that decision. *Winston v. Smithsonian Science Information Exchange, Inc.*, 437 F. Supp. 456, 473 (D.D.C. 1977).

In the present case, the jury's determination that the process defendant utilized to dismiss plaintiff was a pretext for age discrimination has no evidentiary support and is wholly speculative. No reasonable juror could conclude that plaintiff has proven such an assertion by a preponderance of the evidence.

CONCLUSION

Peter Coburn's story appeals to the sympathy of this Court, as it apparently did to the jury. The record reflects that Mr. Coburn devoted long years of service to Pan American and derived justified pride from that effort. Yet it must not be forgotten that the law under which plaintiff brings suit provides for recovery only in the event that defendant terminated plaintiff's employment because of his age. Neither the Court nor the jury may find for the plaintiff in order to reward past services to defendant or

because of some general feeling that plaintiff deserved better from his longstanding employer. "[T]he question for the jury was not whether plaintiff was treated fairly but whether discrimination occurred." *Sahadi v. Reynolds Chemical,* 636 F.2d 1116, 1117 (6th Cir. 1980).

The record simply is devoid of any indication that discriminatory animus on the basis of age played a part in defendant's decision to terminate plaintiff's employment. Reluctantly, we are compelled to grant judgment for defendant notwithstanding the verdict rendered by the jury. We deny defendant's motion in the alternative for a new trial.

An order consistent with the foregoing has been entered this day.

/s/ J. H. Pratt
John H. Pratt
United States District Judge

May 7th, 1982.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETER D. COBURN,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 81-1086
	)	
PAN AMERICAN WORLD AIRWAYS, INC.,	)	
	)	
	)	
Defendant.	)	

JUDGMENT

Upon consideration of defendant's motion for judgment notwithstanding the verdict rendered by the jury in the above captioned case on March 19, 1982 and pursuant to which a judgment of this Court was entered on April 2, 1982, or in the alternative for a new trial, the memoranda of points and authorities in support and opposition thereto, and the entire record herein, it is by the Court this 7th day of May, 1982,

ORDERED, ADJUDGED AND DECREED that defendant's motion for judgment notwithstanding the verdict is granted, the judgment of this Court entered on April 2, 1982 is vacated, and judgment is entered in favor of the defendant, and it is

FURTHER ORDERED that defendant's motion in the alternative for a new trial is denied, and it is

FURTHER ORDERED that plaintiff's motions for additional back wages, prejudgment interest, reinstatement, and liquidated damages are denied.

/s/ J. H. Pratt
John H. Pratt
United States District Judge

FILED
May 7, 1982
JAMES F. DAVEY, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PETER D. COBURN,	)	
	)	
Plaintiff,	)	
	)	Civil Action
v.	)	No. 81-1086
	)	
PAN AMERICAN WORLD AIRWAYS, INC.,	)	
	)	
	)	
Defendant.	)	

ORDER

Upon remand by the United States Court of Appeals to permit consideration of appellee's motions with respect to plaintiff's ADEA claims to amend this Court's judgment of May 7, 1982, and after reconsideration of said judgment of May 7, 1982, it is concluded that appellee's motion should be granted and our judgment amended pursuant to Rule 50(c)(1), Fed.R.Civ.P., and in the exercise of our discretion, it is by this Court this 27th day of September, 1982,

ORDERED that defendant's motion for judgment notwithstanding the verdict with respect to plaintiff's ADEA claims is again granted, the judgment entered on April 2, 1982 is vacated, and judgment n.o.v. entered in favor of the defendant; and it is

ORDERED that defendant's motion, in the alternative, for a new trial, which was previously denied, is conditionally granted; and it is

FURTHER ORDERED that plaintiff's motions for additional backpay, prejudgment interest, reinstatement, and liquidated damages are again denied.

/s/J. H. Pratt
John H. Pratt
United States District Judge

FILED
Sep. 28, 1982
JAMES F. DAVEY, Clerk